International Brotherhood of Teamsters Union, Local No. 407 *and* Norris Brothers Co., Inc. *and* International Union of Operating Engineers, Local 18. Case 08–CD–124416

March 24, 2015

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Norris Brothers Co., Inc. (the Employer) filed a charge on March 14, 2014, alleging that International Brotherhood of Teamsters Union, Local No. 407 (Teamsters) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). A hearing was held on May 27 and 29, June 3 and 17, 2014, before Hearing Officer Melanie R. Bordelois. Thereafter, the Employer, Teamsters, and Operating Engineers filed posthearing briefs. Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Ohio corporation with a principal office in Cleveland, stipulated that it annually purchases and receives goods and equipment valued in excess of $50,000 from points located outside the State of Ohio, and that its annual gross revenues are approximately $15 million. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Teamsters and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer operates an industrial contracting company in northeast Ohio. Since at least the 1950s, the Employer has performed rigging work at a facility currently operated by Nestle USA, located at 2621 W. 25th Street, Cleveland, Ohio. The Employer's riggers load, haul, offload, place, assemble, and disassemble heavy equipment and machinery. Riggers utilize various kinds of equipment to complete their tasks, including forklifts, lift trucks, and/or industrial trucks. Representatives of the Employer and Teamsters testified that only Teamsters-represented employees have used forklifts, lift trucks, and/or industrial trucks for the Employer's rigging work at the Nestle facility.

The Employer has been signatory to successive collective-bargaining agreements negotiated by the Construction Employers Association of Greater Cleveland (CEA) and Operating Engineers.[1] The CEA contract states that "the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts. . . ."

The Employer is also a member of the Cleveland Draymen Association, Inc.,[2] which negotiates collective-bargaining agreements with Teamsters. The most recent Draymen contract states that the Employer shall assign to members of Teamsters "all operations of lift trucks, winches mounted on trucks, tractors, or 'cats,' 'cats' when used in moving machinery, rigging, or erecting, or on the handling of any stock or materials (as in a plant move), or any rigging work."[3]

On July 17, 2012, the Employer was engaged in the installation of a two-story, spiral conveyor system at the Nestle facility in Cleveland. To install the conveyor system, the Employer's riggers, represented by Teamsters, used an A-frame, chain falls, and a lift truck with a boom attachment. Foreman David Ricupero testified that, while the Employer's riggers were installing the conveyor system, Operating Engineers' business agent, David Russell, Jr., asked him what was going on. Ricupero further testified that he declined to answer Russell's questions about the project and told him to get in touch with the Employer.

On July 18, 2012, Russell filed a grievance claiming that the Employer breached the CEA contract "by failing to employ Operating Engineers on their forklift on Tuesday, July 17, 2012." To remedy the alleged breach of contract, Operating Engineers requested that the Employer "pay a penalty to the first (1st) District 1 qualified

[1] CEA is a multiemployer bargaining association that represents construction industry employers in negotiating and administering collective-bargaining agreements with various labor organizations.

[2] Cleveland Draymen Association is a corporation that represents employers engaged in the moving, rigging, and erecting industry.

[3] The most recent Draymen contract was effective September 1, 2011, through August 31, 2014.

register applicant the amount of all applicable wages and fringes from the first (1st) day of violation continuing thereafter until the project's completion." The grievance has not been resolved.

On September 3, 2013, Operating Engineers filed a petition to enforce arbitration agreement in the court of common pleas of Cuyahoga County, Ohio. Thereafter, in a letter dated March 13, 2014, Teamsters President Frank Burdell notified the Employer that he was aware that Operating Engineers had filed a grievance claiming that its members are entitled to work that has historically been performed by Teamsters-represented employees. Burdell's letter stated that if the Employer "reassign[ed] lift truck or fork truck operation from members of Local 407 to members of Local 18, [the Employer] will have willfully breached the Local 407 Agreement," and that, in the event of a willful breach of contract, Teamsters would "have no choice but to take any and all lawful action, including but not limited to engaging in picketing and strike activities against [the Employer] to protect its work jurisdiction and to defend the terms and conditions of the Local 407 Agreement."

B. Work in dispute

The notice of hearing described the disputed work as "[t]he work performed utilizing forklifts, lift trucks and/or industrial trucks by the Employer at the facility operated by Nestle USA, located at 2621 W. 25th Street, Cleveland, Ohio." At the hearing, the Employer and Teamsters stipulated that this description was accurate. In their separate posthearing briefs, however, the Employer and Teamsters clarified that forklifts, lift trucks, and/or industrial trucks are used in rigging.[4] Operating Engineers declined to join the stipulation on the grounds that doing so would be contrary to its legal position that there is no work in dispute, but it did stipulate that the notice of hearing indicates that the Employer and Teamsters allege that there is a dispute over forklift work.

We find, based on the record, that the work in dispute is the operation of forklifts, lift trucks, and/or industrial trucks by the Employer when performing rigging work at the facility operated by Nestle USA, located at 2621 W. 25th Street, Cleveland, Ohio.

C. Contentions of the Parties

The Employer and Teamsters contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by Teamsters' threat to picket or strike if the work in dispute were reassigned, and that the work in dispute should be awarded to Teamsters-represented employees based on the factors of employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. In addition, the Employer contends that the factor of collective-bargaining agreements weighs in favor of awarding the disputed work to employees represented by Teamsters. The Employer and Teamsters further contend that a broad, areawide award is warranted because it is likely that similar disputes over the assignment of forklift, lift truck, and/or industrial truck work will arise in the future.

Operating Engineers contends that the notice of hearing should be quashed because there are no competing claims for the work in dispute, as the objective of Operating Engineers' pay-in-lieu grievance is work preservation, not work acquisition; there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated; and there is an agreed-upon method for voluntary adjustment of the matter. If the notice of hearing is not quashed, Operating Engineers contends that the disputed work should be awarded to employees it represents based on the factors of collective-bargaining agreements, area and industry practice, relative skills and training, and economy and efficiency of operations. Finally, Operating Engineers contends that if the disputed work is awarded to Teamsters-represented employees the scope of the award must be limited to the jobsite that was the subject of the Operating Engineers' pay-in-lieu grievance.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that Teamsters and Operating Engineers have claimed the work in dispute for the employees they respectively represent. Teamsters-represented employees' performance of the

[4] The Employer described the disputed work as "the operation of lift trucks when performing rigging work in a warehouse or close quarters setting at Norris job sites in the greater Cleveland area." Teamsters described the disputed work as the Employer's "rigging work, specifically, forklift/lift truck work performed by members of Local 407 engaged in rigging operations at Nestle."

disputed work indicates their claim to it. *Laborers Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37, slip op. at 3 (2014). In addition, Teamsters' threat to picket or strike if the Employer reassigned the disputed work to employees not represented by Teamsters also constituted a claim to the work in dispute. Id.

Despite its contention that there are no competing claims to the work, Operating Engineers claimed the disputed work by filing its pay-in-lieu grievance with the Employer. "The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work." *Operating Engineers Local 18 (Donley's, Inc.)*, 360 NLRB No. 113, slip op. at 4 (2014) (citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005)).

Moreover, we find no merit in Operating Engineers' contention that the grievance constitutes a work preservation claim. The record shows, with respect to rigging work at the Nestle facility, that the Employer has always assigned the use of forklifts, lift trucks, and/or industrial trucks to Teamsters-represented employees. Where, as here, a labor organization is claiming work that has not previously been performed by employees it represents, the "objective is not work preservation, but work acquisition," and the Board will resolve the dispute through a 10(k) proceeding. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited therein.

2. Use of proscribed means

We find reasonable cause to believe that Teamsters used means proscribed by Section 8(b)(4)(D) to enforce its claim to the work in dispute. As set forth above, in its March 13 letter to the Employer, Teamsters President Burdell stated that, if the Employer responded to Operating Engineers' pending grievance by reassigning the disputed work to employees represented by Operating Engineers, Teamsters would "have no choice but to take any and all lawful action, including but not limited to engaging in picketing and strike activities against [the Employer] to protect its work jurisdiction and to defend the terms and conditions of the Local 407 Agreement." These statements constitute proscribed means to enforce a claim to disputed work. See *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006) (threat to strike is "sufficient to constitute a violation of Section 8(b)(4)(D) even if it is not followed by other action").

We find no merit in Operating Engineers' contention that Teamsters' threat was not genuine or was the result of collusion with the Employer. The Board has consistently rejected this argument, absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *R&D Thiel*, supra 345 NLRB at 1140. The record here contains no evidence that supports Operating Engineers' contention that the Employer colluded with Teamsters to fashion a sham jurisdictional dispute.[5]

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employer and Teamsters so stipulated at the hearing. Although Operating Engineers contends that all parties are bound to the Construction Site Jurisdictional Agreement between International Brotherhood of Teamsters and International Union of Operating Engineers, the Employer is not a party to this agreement and there is no evidence that the Employer ever agreed to submit this dispute to the International Unions for resolution.

Based on the foregoing, we find that there are competing claims for the work in dispute, there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny Operating Engineers' motion to quash the notice of hearing.

[5] At the hearing, Operating Engineers attempted to question Teamsters President Burdell about conversations he had with Teamsters' counsel in preparing the March 13 letter, and Teamsters objected on the grounds that the subject matter of those conversations was protected by attorney-client privilege. The hearing officer sustained the objection, and Operating Engineers has filed a request for special permission to appeal from the hearing officer's ruling. In its filing, Operating Engineers contends that the hearing officer's ruling prevented it from questioning Burdell about what Teamsters intended when it sent the March 13 letter, and therefore requests that the Board remand the case to the hearing officer to allow Operating Engineers to further question Burdell on this subject. We find that Operating Engineers' contention is without merit. The record shows that, subsequent to the hearing officer's ruling, Operating Engineers' counsel asked Burdell what Teamsters intended when it sent the letter, and Burdell testified that Teamsters sought to prevent Operating Engineers from taking Teamsters' work by informing the Employer that Teamsters was prepared to picket or strike in the event that forklift or lift truck work was reassigned to employees not represented by Teamsters. Burdell further testified that he did not send the letter to precipitate a 10(k) hearing. Based on the foregoing, we find that Operating Engineers was afforded a full opportunity to be heard, to examine and cross-examine witnesses, including Burdell, and to adduce evidence bearing on the issues in this case. See generally *Electrical Workers Local 9 (G. A. Rafel & Co.)*, 128 NLRB 899, 900 fn. 1 (1960) (request for special appeal from hearing officer's refusal to permit a party to adduce additional testimony denied where the additional testimony could not alter the Board's conclusions based on the undisputed facts). Accordingly, the request for special permission to appeal is denied.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employer is signatory to separate multiemployer collective-bargaining agreements with Operating Engineers (the CEA contract) and Teamsters (the Draymen contract). The jurisdiction clause in the CEA contract states, in relevant part, that "the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts . . . ." The jurisdiction clause in the Draymen contract states that the Employer shall assign to members of Teamsters "all operations of lift trucks, winches mounted on trucks, tractors, or 'cats,' 'cats' when used in moving machinery, rigging, or erecting, or on the handling of any stock or materials (as in a plant move), or any rigging work."

We find that the language in both contracts covers the work in dispute. Therefore, this factor does not favor an award to either group of employees.

2. Employer preference and past practice

The Employer's representatives testified that the Employer prefers to use Teamsters-represented employees to operate the forklifts, lift trucks, and/or industrial trucks when performing rigging tasks at the Nestle facility, that it currently assigns this work to Teamsters-represented employees, and that it has assigned this work to Teamsters-represented employees for the past 40 years. The Employer's representatives further testified that, before Nestle took over operation of the facility on W. 25th Street, the Employer used Teamsters-represented employees to operate forklifts, lift trucks, and/or industrial trucks when performing rigging tasks for the company that previously occupied the facility. We therefore find that this factor favors an award of the work in dispute to employees represented by Teamsters.

3. Area and industry practice

The Employer's president, Ken McBride, testified that the Employer has always used employees represented by Teamsters to perform rigging work that required the operation of forklifts, lift trucks, and/or industrial trucks. McBride further testified that the two companies with which it competes for work in northeast Ohio—Tesar Industrial Contractors and American Industrial Rigging—have, for at least 40 years, exclusively used Teamsters-represented employees to perform rigging work that required the operation of forklifts, lift trucks, and/or industrial trucks.

Operating Engineers introduced an agreement and several "affirmations" between the International Unions in support of its contention that employers in northeast Ohio use employees represented by Operating Engineers to perform the work in dispute.[6] It also introduced work orders from signatory contractors for the referral of Operating Engineers' members capable of performing forklift work, and letters of assignment from various employers stating that they would assign forklift work to Operating Engineers' members in the future. These documents do not, however, show that Operating Engineers-represented employees have actually performed work of the kind in dispute for employers in the area or industry. See generally *KMU Trucking & Excavating*, 361 NLRB No. 37, slip op. at 5 & fn. 13 (documents failed to establish area or industry practice where they did not reflect that area or industry employers had, in fact, conformed to the documents' terms or used the union's members to perform work of the kind in dispute). As such, they fail to establish an area or industry practice of using members of Operating Engineers to perform the work in dispute.

We find that this factor favors an award of the work in dispute to employees represented by Teamsters.

4. Relative skills and training

Both Teamsters and Operating Engineers introduced evidence that employees they represent receive training to perform the kind of work in dispute. The Employer's safety director, Bruce DeMarco, testified that the Employer provides Teamsters-represented employees annual

[6] These documents include a February 16, 1945 supplemental agreement between the International Unions concerning the operation of "Dual-Purpose Trucks"; a July 7, 1988 letter from the International Union of Operating Engineers General President to all Regional Directors, International Representatives, and H & P Local Union Business Managers defining "laydown area" and "warehouse or storage area"; and a May 18, 1993 letter from the International Unions' General Presidents to the President of Teamsters Local 722 regarding a jurisdictional dispute between Teamsters Local 722 and Operating Engineers Local 150.

training in rigging with forklifts, lift trucks, and/or industrial trucks. Donald Black, the administrative manager of the Ohio Operating Engineers Apprenticeship Training Fund, testified that he manages the operation of four training facilities in Ohio, where employees represented by Operating Engineers are trained in rigging and the operation of forklifts, lift trucks, and/or industrial trucks.

We find from this evidence that this factor does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Representatives of the Employer testified that it is more efficient and economical for the Employer to assign the operation of forklifts to employees represented by Teamsters. They testified that, in addition to operating forklifts, lift trucks, and/or industrial trucks, employees represented by Teamsters transport the Employer's rigging equipment to the Employer's worksites. They further testified that forklifts, lift trucks, and/or industrial trucks are used for only a portion of a rigger's workday, and that Teamsters-represented employees perform other rigging tasks when not engaged in the disputed work. For example, Foreman Ricupero testified that the Employer's riggers may use a lift truck for 20 minutes on a 4-hour job, and that the rest of the time would be spent using other tools of the trade, including jacks, blocks, wrenches, chains, chokers, come alongs, and chain falls. Consequently, the Employer's representatives explained that the Employer would incur additional costs if it had to hire employees represented by Operating Engineers to operate forklifts, lift trucks, and/or industrial trucks, while hiring Teamsters-represented employees to complete other rigging tasks that do not require the use of such equipment. Although Operating Engineers contends that the employees it represents could perform the disputed work and "any of its attendant duties" as efficiently as the employees represented by Teamsters, it does not contend that the "attendant duties" are within its jurisdiction or that such work should be assigned to employees it represents.

Based on the foregoing, we find that this factor favors an award to employees represented by Teamsters.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Teamsters are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Teamsters, not to that labor organization or its members.

Scope of Award

The Employer and Teamsters request a broad, areawide award covering northeast Ohio. The Employer contends that Operating Engineers has demonstrated a proclivity to claim forklift work for employees it represents and engage in conduct that violates Section 8(b)(4)(D), and that the dispute here is likely to recur. Teamsters contends that Operating Engineers' "position with respect to its right to pay in lieu of work (as well as [its] documented history of attempting to expand its work jurisdiction in similar cases) demonstrate that more jurisdictional challenges are likely to arise between these parties in the absence of an area-wide award."

We do not find that the record supports a broad, areawide award. "The Board will not impose a broad award in the absence of evidence demonstrating that the union against which the broad award will lie has resorted to unlawful means to obtain work and that such unlawful conduct will recur." *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335, 1338 (1993). Although the Board has previously found reasonable cause to believe that Operating Engineers has attempted to obtain forklift work by conduct prohibited by Section 8(b)(4)(D),[7] there is neither an allegation nor evidence in this case that Operating Engineers engaged in proscribed conduct by filing its pay-in-lieu grievance to obtain work of the kind in dispute.[8] The record also lacks evidence that Operating Engineers is likely to engage in proscribed conduct in a future dispute with any of the parties in this case. Accordingly, we shall limit the present determination to the particular controversy that gives rise to this proceeding.

Determination of Dispute

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Norris Brothers Co., Inc., who are represented by International Brotherhood of Teamsters Union, Local No. 407 are entitled to operate forklifts, lift trucks, and/or industrial trucks when performing rigging work at the facility operated by Nestle USA, located at 2621 W. 25th Street, Cleveland, Ohio.

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[7] In *Laborers' Local 894 (Donley's Inc.)*, 360 NLRB No. 20 (2014), and *Operating Engineers Local 18 (Donley's, Inc.)*, 360 NLRB No. 113, the Board found reasonable cause to believe that Operating Engineers violated Sec. 8(b)(4)(D) in disputes involving Operating Engineers and Laborers locals in northeast Ohio.

[8] See *Teamsters Local 222 (Geneva Rock Products)*, 322 NLRB 810, 811 (1996) (finding no reasonable cause to believe Sec. 8(b)(4)(D) had been violated by union's filing of a contractual grievance where "the [union's] contract with the Employer arguably cover[ed] the work in dispute, and there [was] no outstanding Board award under Section 10(k) adverse to the [union's] claim to the work in dispute").

Dated, Washington, D.C. March 24, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD